IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES OMSHA, an individual, Respondent, v. JOSEPH MARTIN and BERTHA MARTIN, husband and wife, Appellants.	)	No. 64942-6-I DIVISION ONE UNPUBLISHED FILED: June 28, 2010

Cox, J. — Parties to a civil action may stipulate to arbitrate under the Mandatory Arbitration Rules (MARs) matters that would not otherwise be subject to arbitration under MAR 1.2.[1] In that event, the case is subject to all the MARs, except as the parties otherwise agree under MAR 8.1(a).[2]

Here, the parties stipulated, in writing, that this case "will be transferred to Mandatory Arbitration pursuant to MAR 8.1." Thereafter, the parties made representations to the arbitrator during the arbitration proceeding. These representations are reflected in the Amendment to Arbitration Award. Nowhere in this record is there any stipulation or agreement by the parties regarding MAR

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[1] MAR 8.1(b).

[2] Id.

7.3, which governs the award of costs and attorney fees. Nevertheless, the superior court denied the motion of Joseph and Bertha Martin for an award of attorney fees pursuant to that rule. For the reasons we explain, we reverse and remand.

In October 2007, James Omsha commenced this action to quiet title and for trespass, seeking damages and other relief against the Martins, his neighbors. The Martins allegedly trimmed a hedge that Omsha claims is located on property he claims to own by adverse possession.

Sometime in 2008, after the trial court denied cross-motions for summary judgment, the parties entered into a written agreement to arbitrate. That agreement states, in part, that they agreed "to arbitration under the provisions of Chapter 7.04 RCW." We note that the legislature repealed this chapter effective January 1, 2006.[3]

In September 2008, the parties stipulated, in writing, that this case "will enter Mandatory Arbitration pursuant to MAR 8.1(b)." The superior court entered an order on that stipulation transferring the dispute between these parties into "Mandatory Arbitration pursuant to MAR 8.1(b)."

The arbitrator filed an award in February 2009, denying all claims of Omsha. Thereafter, Omsha requested a trial de novo pursuant to MAR 7.1. The Martins moved to strike the request because the parties had agreed that the arbitration would be final and binding. They requested an award of attorney fees and also moved to amend the arbitration award to indicate that the parties had

[3] Former RCW 7.04, repealed by Laws of 2005, ch. 433, § 50.

agreed to waive the right to a trial de novo. The trial court denied the motion to strike the request for a trial de novo and granted the motion to amend the arbitration award.

The Amendment to Arbitration Award dated April 2, 2009, which the arbitrator signed, states in relevant part:

> I issued the arbitration award with the understanding that the arbitration was final and binding upon all parties and that all parties waived their right to appeal to the Superior Court for a trial de novo. . . . The final and binding nature of this arbitration was undisputed by either party at the arbitration hearing.
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> During the arbitration, it was my understanding that the parties agreed to perform the arbitration pursuant to the Mandatory Arbitration Rules (MAR) for convenience purposes only. I understood the agreement to conduct the arbitration pursuant to the MAR in no way affected the parties' agreement that the arbitration was final and binding and that all parties waived their right to appeal to the Superior Court for a trial de novo.[4]

On reconsideration, the trial court granted the Martins' motion to strike Omsha's motion for a trial de novo.[5] The trial court concluded that the parties "entered into an agreement to engage in binding arbitration and waived any and all right to a request for trial de novo."[6] The court reserved ruling on the Martins' request for attorney fees.

Following additional briefing, the court denied the Martins' motion for attorney fees and costs. According to the court, "as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for

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[4] Clerk's Papers at 77-78.

[5] Id. at 81-82.

[6] Id. at 82.

attorneys fees."[7]

The Martins appeal.

STIPULATION TO ARBITRATE

Arbitration is a statutory proceeding.[8] Thus, as a threshold matter, this court may determine de novo which statutes initially governed the arbitration between the parties.[9]

Chapter 7.06 RCW makes certain civil actions subject to mandatory arbitration in the superior courts of counties meeting the statutory criteria.[10] The MARs govern mandatory arbitration of civil actions under chapter 7.06 RCW.[11] If the parties stipulate to arbitrate under MAR 8.1, and the case is transferred to arbitration, the MARs apply in their entirety, except as the parties otherwise agree under MAR 8.1(a).[12]

MAR 8.1 provides:

> **(a) Generally**. No agreement or consent between parties or lawyers relating to the conduct of the arbitration proceedings, the purport of which is disputed, will be regarded by the arbitrator unless the agreement or consent is made at the arbitration hearing, or unless the agreement or consent is in writing and signed by the lawyers or parties denying the same.

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[7] Clerk's Papers at 158.

[8] In re Parentage of Smith-Bartlett, 95 Wn. App. 633, 636, 976 P.2d 173 (1999).

[9] Post v. City of Tacoma, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

[10] RCW 7.06.010-.020(1).

[11] MAR 1.1.

[12] MAR 8.1(b).

> **(b) To Arbitrate Other Cases**. The parties may stipulate to enter into arbitration under these rules in a civil matter that would not otherwise be subject to arbitration under rule 1.2. ***A case transferred to arbitration by stipulation is subject to the arbitration rules in their entirety, except as otherwise agreed under section (a)***.[13]

Here, the parties stipulated to enter into arbitration under the MARs in this civil matter that was not otherwise subject to arbitration under MAR 1.2. Their stipulation and the order transferring this case to arbitration expressly reference MAR 8.1(b). Specifically, the order directs that the parties "will enter Mandatory Arbitration pursuant to MAR 8.1(b)."[14]

Because the parties expressly agreed to enter into arbitration pursuant to MAR 8.1(b), the provisions of that rule regarding the applicability of the arbitration rules to this case are particularly important. The last sentence of MAR 8.1(b) states that "A case transferred to arbitration by stipulation is subject to the arbitration rules ***in their entirety, except as otherwise agreed under section (a)***."[15] Thus, all the MARs apply to this case, except as these parties otherwise agreed under the provisions of MAR 8.1(a).

Our examination of this record shows that the parties never agreed, in writing or otherwise, to except application of MAR 7.3, the rule for award of costs and attorney fees, from applying to this case. The Amendment to Arbitration Award that the arbitrator filed with the court does not refer to MAR 7.3, attorney

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[13] (Emphasis added.)

[14] Clerk's Papers at 209-10.

[15] (Emphasis added.)

fees, or costs. Rather, it deals with the nature of the parties' agreements at the arbitration hearing. These included "that the arbitration was final and binding upon all parties," that "all parties waived their right to appeal to the Superior Court for a trial de novo," and that the arbitrator understood that "the parties agreed to perform the arbitration pursuant to the Mandatory Arbitration Rules (MAR) for convenience purposes only."

Because there is no agreement by the parties respecting MAR 7.3, that rule applies to this case. The trial court incorrectly concluded that it does not.

Because we conclude that MAR 7.3 applies to this case, we need not address the parties' prior written stipulation to arbitrate pursuant to chapter 7.04 RCW, which the legislature had previously repealed.

ATTORNEY FEES

The Martins argue that they are entitled to an award of attorney fees and costs under MAR 7.3. We agree.

MAR 7.3 provides:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

The Martins argue that they are entitled to attorney fees and costs under the plain language of MAR 7.3 because Omsha requested a trial de novo following the arbitrator's adverse award and failed to improve his position. His

request for a trial de novo was dismissed prior to trial. He did not voluntarily withdraw his request for a trial de novo.

MAR 7.3 has been broadly interpreted to permit the award of attorney fees and costs even if the motion for trial de novo is dismissed prior to trial.[16] For example, in Kim v. Pham,[17] this court granted Kim's request for attorney fees and costs under MAR 7.3 where Pham filed a request for a trial de novo but failed to comply with MAR 7.1's service requirement.[18] The court ruled "MAR 7.3 does not directly address the instant case because it was neither adjudicated on the trial de novo nor was Pham's request 'voluntarily' withdrawn."[19]

Our supreme court ruled in accord with Kim in Wiley v. Rehak.[20] There, the arbitrator ruled in favor of the plaintiff, Wiley, and the defendants filed a request for a trial de novo.[21] However, the notice of appeal listed the wrong

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[16] See, e.g., Brandenberg v. Cloutier, 103 Wn. App. 482, 12 P.3d 664 (2000) (awarding fees where the appealing party's request for a trial de novo was dismissed due to his failure to file the request within 20 days as required under MAR 7.1); Wiley v. Rehak, 143 Wn.2d 339, 20 P.3d 404 (2001) (awarding fees where the appealing party's request for a trial de novo was dismissed due to failure to strictly comply with filing requirements); Kim v. Pham, 95 Wn. App. 439, 975 P.2d 544 (1999) (awarding fees where request for trial de novo was dismissed because appealing party failed to file service of request within 20 days of entry of arbitration award as required by MAR 7.1).

[17] 95 Wn. App. 439, 975 P.2d 544 (1999).

[18] Id. at 443-45.

[19] Id. at 446.

[20] 143 Wn.2d 339, 20 P.3d 404 (2001).

[21] Id. at 341-42.

defendants, parties who had previously been dismissed from the case.[22] The trial court allowed the defendants to amend the notice of appeal to name the correct party after the deadline for filing had passed.[23] Wiley appealed and Division Two of this court concluded that the trial court lacked the ability to allow untimely amendment, entered judgment on the arbitration award, and awarded attorney fees to Wiley.[24]

The supreme court affirmed, concluding with respect to the award of fees, that while "MAR 7.3 does not directly address cases that are not adjudicated at a trial de novo[, t]he court in Kim interpreted this rule as requiring 'a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial de novo.'"[25]

Here, like the parties requesting a trial de novo in Kim and Wiley, Omsha failed to improve his position at trial because he failed to comply with the requirements for proceeding to a trial de novo. MAR 7.1(a) lists the requirements for requesting a trial de novo. That rule states in relevant part:

> Within 20 days after the arbitration award is filed with the clerk, any aggrieved party ***not having waived the right to appeal*** may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been

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[22] Id. at 342.

[23] Id. at 343.

[24] Id.

[25] Id. at 348 (citing Kim, 95 Wn. App. at 446-47).

served upon all other parties appearing in the case.[26]

Omsha failed to strictly comply with MAR 7.1's requirements for requesting a trial de novo because he had previously waived the right to appeal as the Amendment to Arbitration Award reflects. As our supreme court concluded in Wiley, attorney fees are properly assessed against a party who requests a trial de novo and fails to improve his or her position as to an adverse party's claim because they failed to comply with the requirements for proceeding to a trial de novo.[27]

An award of attorney fees in this case is consistent with the purpose and intent of the MARs. The court construes the MARs in accord with their purpose.[28] The purpose of MAR 7.3 is to promote the finality of disputes, discourage meritless appeals from arbitration awards, and reduce court congestion.[29] Specifically, MAR 7.3 is intended to encourage parties to accept the arbitration award by penalizing unsuccessful appeals from the award.[30]

Here, these purposes would be frustrated by not awarding fees against Omsha under the circumstances of this case. He sought a trial de novo after an adverse award and having agreed to waive the right to appeal.

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[26] (Emphasis added.)

[27] Wiley, 143 Wn.2d at 349.

[28] Nevers, v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

[29] Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 526, 79 P.3d 1154 (2003).

[30] Hudson v. Hapner, 146 Wn. App. 280, 285, 187 P.3d 311 (2008).

Omsha argues that the trial court's order denying fees and costs was proper under MAR 7.3 because there was no final adjudication and the request for a trial de novo was not voluntarily withdrawn. Based on the above case law, this argument is without merit. Washington courts have not required a trial in order to conclude that the appealing party did not improve their position for purposes of MAR 7.3. Rather, Washington courts have consistently awarded fees when a request for a trial de novo is dismissed prior to trial due to the appealing party's failure to comply with MAR 7.1(a).

The amount of reasonable attorney fees that are awardable are limited to those incurred after Omsha's request for a trial de novo, as the last sentence of MAR 7.3 specifies. The trial court shall determine the amount of the award on remand.

Fees on Appeal

The Martins argue that they are entitled to fees and costs incurred on appeal pursuant to RAP 18.1 and MAR 7.3. We agree.

Attorney fees are awardable on appeal if allowed by statute, rule, or contract.[31] Here, MAR 7.3 provides:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for trial de novo. . . . Only ***those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule***.[32]

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[31] Malted Mousse, 150 Wn.2d at 535.

[32] (Emphasis added.)

This rule has been interpreted as allowing for an award of costs and fees incurred both at the trial level and on subsequent appeal.[33] The Martins are therefore entitled to costs and attorney fees incurred on appeal in addition to those costs and attorney fees incurred below.

Pursuant to RAP 18(i), we direct the trial court on remand to determine the amount of fees on appeal.

We reverse and remand with instructions for the trial court to award reasonable attorney fees and costs to the Martins.

Cox, J.

WE CONCUR:

Leach, A.C.J.

Becker, J.

[33] Tribble v. Allstate Property & Cas. Ins. Co., 134 Wn. App. 163, 174, 139 P.3d 373 (2006); Brandenberg, 103 Wn. App. at 485 n.7.